Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

HOLIDAY QUALITY FOODS, INC.
Petitioner,

v.

JERRY DORAN
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether the Ninth Circuit erred in holding, directly contrary to Article III of the United States Constitution and this Court's opinions in *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992), *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), *Gladstone Realtors v. Village of Bellwood* 441 U.S. 91 (1979), and others, that a plaintiff has standing to sue under Title III of the Americans with Disabilities Act of 1990 ("ADA") even in the absence of a concrete and particularized injury in fact.

2. Whether the Ninth Circuit erred in holding, in direct conflict with this Court's authority and with other circuits of the United States Court of Appeals, that a plaintiff's claim under the ADA "is not barred ... by the statute of limitations," even though the claim is based on acts known to have occurred far outside the limitations period.

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit.

Before the district court, the original complaint named the following additional plaintiffs: Brenda Pickern, Floyd Smith, Paul Heard and Michael Kennedy. Those plaintiffs were not named in the second amended complaint, on which this petition is based, leaving only plaintiff Jerry Doran.

At the time of the filing of the original complaint, Holiday Quality Foods, Inc. owned and operated the Anderson, Paradise and Orland stores at issue. Subsequently, Holiday Quality Foods, Inc. merged into North State Grocery, Inc., which continued to operate the Anderson, Paradise and Orland stores under the fictitious business name ("dba") of Holiday Quality Foods. For convenience and consistency of the record, reference to petitioner remains "Holiday Quality Foods, Inc."

No publicly held company owns 10% or more of North State Grocery, Inc.'s stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 19, 2002.

OPINIONS BELOW

The judgment and memorandum and order of the United States District Court for the Eastern District of California were entered on October 18, 2000. The District Court's ruling, which has not been published, is reprinted in the Appendix, at page 12a.

The decision of the United States Court of Appeals for the Ninth Circuit, reversing and remanding the District Court's judgment, was entered on June 19, 2002. The Ninth Circuit's decision, reprinted in the Appendix, at page 1a, is reported at 293 F.3d 1133 (9th Cir. 2002).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

Title III of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101, *et seq.* (the "ADA"), which provides in pertinent part:

§ 12182. - Prohibition of discrimination by public accommodations.

(a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction.

(1) General prohibition.

(A) Activities.

(i) Denial of participation. It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

***

(2) Specific prohibitions.

(A) Discrimination. For purposes of subsection (a) of this section, discrimination includes -

***

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and

rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

***

§ 12188. - Enforcement.

(a) In general.

(1) Availability of remedies and procedures. The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

***

STATEMENT OF THE CASE

On March 1, 1999, Respondent Jerry Doran ("Doran") and others brought suit against Holiday Quality Foods ("Holiday"), alleging violations of the ADA in a number of Holiday's grocery stores. (Appendix ("App."), at 5a.) On June 27, 2000, Doran filed his second amended complaint, in which he was the only named plaintiff. The Holiday stores in which violations were alleged were reduced to three: the Anderson store, the Paradise store and the Orland store.

At the time he filed suit, Doran never had been to the Orland store (App. at 14a), and had not visited the Anderson store during the time period from November 16, 1997 to the date he filed his action on March 1, 1999. Doran visited the Paradise store only once within that time period but, even then, did not attempt to enter the store. Rather, Doran waited in his vehicle while his friend quickly went inside to shop. (*Id.*)

On August 31, 2000, in response to Doran's lawsuit, Holiday filed a motion for summary judgment on the grounds that Doran lacked standing to raise an ADA claim as to the Orland store and that his ADA claims against the Anderson and Paradise stores were barred by the statute of limitations. (App. at 15a.) On October 18, 2000, the district court granted summary judgment in favor of Holiday as to Doran's ADA claims. The district court also dismissed Doran's pendant state law claims. (App. at 13a.)

The district court ruled that an ADA claim first arises when the plaintiff knows or has reason to know

of the injury that is the basis of the claim. (App. at 19a.) The district court also observed that Doran had been inside both the Anderson and Paradise stores before 1997 and learned of the alleged violations at least two years before filing his action. (App. at 20a.) Applying a one-year statute of limitations to Doran's claims,[1] and rejecting Doran's continuing violation argument (App. at 19a, 22a), the district court found Doran's claims against the Anderson and Paradise stores to barred by the statute of limitations (App. at 22a).

As to the Orland store, the district court ruled that the necessary element of standing of a "real and immediate threat of future harm" was lacking because Doran had never been to that store and was unlikely to visit the store in the future. (App. at 23a.)

Doran appealed. In reversing the district court's judgment, the Ninth Circuit ruled that a plaintiff seeking injunctive relief against an ongoing ADA violation is not barred either by the statute of limitations or by lack of standing. (App. at 3a.) The Ninth Circuit interpreted phrases in the ADA such as "is being subjected to" and "is about to be subjected to" as meaning that a continuing or threatened violation is an "injury" (App. at 6a), and interpreted the ADA's "futile gesture" language as meaning that a plaintiff suffers injury as soon as he or she obtains knowledge of an alleged ADA violation and, without more, decides not to patronize that establishment (App. at 7a). The Ninth Circuit concluded

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[1] The parties do not dispute that the district court applied the appropriate limitations period. (App. at 18a-19a.)

> "... so long as the discriminatory conditions continue, and so long as the plaintiff is aware of them and remains deterred, the injury under the ADA continues."

(*Id.*) Therefore, according to the Ninth Circuit, even though Doran first encountered an alleged barrier at the Paradise store well outside the statute of limitations period, as long as that barrier remains, Doran's claim is not time barred. (App. at 8a.)

On the issue of standing, the Ninth Circuit, abandoning long established requirements of standing, ruled that Doran need not have physically visited the Paradise store. Rather, according to the Ninth Circuit, Doran had suffered an "injury in fact" merely by having actual knowledge of the alleged barrier and deciding not to patronize the store. (App. at 11a.) This rationale is demonstrably at odds with the United States Constitution, the prior decisions of this Court, and the decisions of other federal appellate courts.

This petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit follows.

REASONS FOR GRANTING THE WRIT

In its ruling, the Ninth Circuit has departed significantly from long established authority of this Court. In so doing, the Ninth Circuit has created a direct and intolerable conflict with that authority and with the law of other federal appellate courts. A different rule of standing for ADA plaintiffs now exists in the Ninth Circuit, and the bar of the statute of

limitations has been eliminated. Businesses operating nationwide now are confronted with two strikingly different sets of law, and face great uncertainty within the Ninth Circuit. The conflict created by the Ninth Circuit must not be tolerated. Certainty and uniformity in the application of the requirements for federal standing, and in the role of the statute of limitations, must be restored.

I. THE NINTH CIRCUIT'S RULING THAT A LACK OF STANDING DOES NOT BAR A CLAIM UNDER THE ADA CREATES AN INTOLERABLE CONFLICT WITH ARTICLE III OF THE UNITED STATES CONSTITUTION AND WITH LONG ESTABLISHED SUPREME COURT AUTHORITY.

> *"When ... a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief...by lack of standing."*
> Ninth Circuit (App. at 3a).

By holding that a lack of standing does not bar a claim under the ADA, the Ninth Circuit has disregarded the requirements of standing of Article III of the United States Constitution, and as enunciated by this Court, and has created a direct and intolerable conflict with the authority of this Court.

In *Lujan v. Defenders of Wildlife* 504 U.S. 555, 119 L.Ed.2d 351, 112 S.Ct. 2130 (1992), this Court stated that the doctrine of standing is one of the landmarks which identify disputes capable of resolution through the judicial process. *Id.* at 560. Article III's "case or controversy" limitation on federal judicial authority underpins standing. *Friends of the Earth, Inc. v. Laidlaw*

Environmental Services (TOC), Inc., 528 U.S. 167, 180, 145 L.Ed.2d 610, 120 S.Ct. 693 (2000).

In order to satisfy Article III's requirement of standing, a plaintiff must show that he has suffered some actual or threatened injury as a result of the defendant's putatively illegal conduct. *Gladstone Realtors v. Village of Bellwood* 441 U.S. 91, 99, 60 L.Ed.2d 66, 99 S.Ct. 1601 (1979). Plaintiff's injury must be personal, distinct and palpable. *Id.* at 100. Otherwise, the exercise of federal jurisdiction "would be gratuitous and thus inconsistent with Article III's limitation." *Id.* at 99.

This Court has developed, as an irreducible constitutional minimum growing out of Article III's "case or controversy" requirement, a three-part test for standing. Only the first prong of that test, "injury in fact," is presented on this petition.

In *Lujan*, this Court stated unequivocally that:

> ... the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized [citations omitted] and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'"

Lujan, supra, at 560; see also, *Friends of the Earth, supra*, at 180. "Particularized" means that the injury must affect the plaintiff in a personal and individual way. *Lujan, supra*, at 560, nt. 1. The foregoing is not merely a pleading requirement but an indispensable part of a plaintiff's case. *Id.* at 561. This Court also has been

explicit that the focus of the inquiry is on the plaintiff's injury, not on the defendant's alleged conduct. *Friends of the Earth, supra,* at 181.

In direct contravention of the foregoing irreducible minimum constitutional requirement for standing, the Ninth Circuit ruled that a lack of standing does not bar a claim under the ADA.[2] Moreover, contrary to this Court's authority, the Ninth Circuit has focused on the defendant's "putatively illegal conduct" and not, as it should have, on the plaintiff's alleged injury.

Ignoring long established requirements of standing, and venturing deeply into the realm of the conjectural and hypothetical, the Ninth Circuit adopted instead a "deterrence" theory of standing:

> We hold that in stating that he is currently deterred from attempting to gain access to the Paradise store, Doran has stated sufficient facts to show concrete, particularized harm.

(App. at 9a.)

Additionally, according to the Ninth Circuit, such deterrence also gives rise to "actual or imminent harm."

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[2] Since an appeal must be dismissed as moot upon the occurrence of an intervening event that renders a decision unnecessary (*Arizonans for Official English v. Arizona* 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997); *City of Auburn v. U.S. Government* 154 F.3d 1025, 1028, nt. 5 (9th Cir. 1998)), when Doran abandoned his claims against the Orland store, the statute of limitations issue *vis-a-vis* the Paradise store should have been the opinion's focus.

> We hold that a disabled individual who is currently deterred from patronizing a public accommodation due to defendant's failure to comply with the ADA has suffered "actual harm." Similarly, a plaintiff who is threatened with harm in the future because of existing or imminently threatened non-compliance with the ADA suffers "imminent harm."

(App. at 10a-11a.)

The Ninth Circuit, thus, creates law pursuant to which a plaintiff need not ever physically visit a business in order to state a claim under the ADA. Rather, such a plaintiff need merely have knowledge of an alleged violation. In the Ninth Circuit, therefore, a plaintiff residing in San Francisco now has standing to sue a business in Seattle for alleged ADA violations, even though that plaintiff never has traveled outside California, may never do so, and may never intend to do so. This unprecedented expansion of the requirements of standing creates an intolerable conflict with the authority of this Court.

Further, the Ninth Circuit's ruling creates an intolerable conflict among the federal appellate courts. The Ninth Circuit's decision stands squarely in conflict with a decision of the Third Circuit on the same issue. In *Doe v. National Board of Medical Examiners* 199 F.3d 146 (3rd Cir. 1999), adhering to the requirements enunciated by this Court in *Lujan*, the Third Circuit ruled that a violation of the ADA, in and of itself, is insufficient to confer standing.

> The District Court concluded that Doe had standing because he "pled infringement of the right to be free from discrimination under the [ADA]." This formulation of standing ... incorrectly equates a violation of a statute with an injury sufficient to confer standing. The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.

Doe, supra, at 153. Thus, unlike the Ninth Circuit, the Third Circuit rejects, as it should, conjectural and hypothetical injuries. The basis of the Third Circuit's statement of law is this Court's requirement that the focus of standing be on the plaintiff's injury, not on the defendant's conduct. *Friends of the Earth, supra,* at 181. The Ninth Circuit has ignored this Court's rule, focusing instead on the defendant's "putatively illegal conduct," thereby permitting a long distance plaintiff to bring claims based not on any actual injury to the plaintiff but solely on the defendant's potential violations of the ADA. The practical impact of this conflict is clear: a San Francisco plaintiff, who now can sue a Starbucks in Seattle that he never has visited, based solely on theoretical or conjectural injury, cannot bring that same exact lawsuit against an identically constructed Starbucks in Philadelphia without showing actual injury. By its ruling, the Ninth Circuit not only creates an intolerable conflict with this Court's authority, but creates a conflict among the lower courts.

The effect of the Ninth Circuit's decision is to create a disparity of treatment of businesses among circuits. Within the geographic area of the Ninth Circuit, in the Ninth Circuit's own words, standing is not a bar to bringing a claim for violation of the ADA. In other parts of the country, traditional rules of standing still apply.

II. THE NINTH CIRCUIT'S RULING THAT THE STATUTE OF LIMITATIONS DOES NOT BAR A CLAIM UNDER THE ADA CREATES AN INTOLERABLE CONFLICT WITH THIS COURT'S AUTHORITY AND AMONG THE LOWER COURTS.

> *When ... a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief ... by the statute of limitations ....*
> Ninth Circuit (App. at 3a).

This Court has long recognized that important policies underlie statutes of limitations: rapid resolution of disputes; repose for those against whom a claim could be brought; avoidance of litigation involving lost evidence or distorted testimony of witnesses. *Wilson v. Garcia* 471 U.S. 261, 266-267, 85 L.Ed.2d 254, 105 S.Ct. 1938 (1985). Sensitive to these policies, this Court observed in *Delaware State College v. Ricks* 449 U.S. 250, 66 L.Ed.2d 431, 101 S.Ct. 498 (1980) that a cause of action accrues at the time the injury initially is known. *Id.* at 258.

Following this guidance, the Seventh Circuit, in *Soignier v. American Board of Plastic Surgery* 92 F.3d 547 (7th Cir. 1996), stated:

> *Delaware State College v. Ricks* 449 U.S. 250, 66 L.Ed.2d 431, 101 S.Ct. 498 (1980), and its progeny in this circuit dictate that discovery of the original act of discrimination, not future confirmation of the injury or determination that the injury is unlawful, is when the statute of limitations begins to run.

Soignier, supra, at 551. Also recognizing the importance of a limitations period, the Seventh Circuit, consistent with this Court's direction, observed:

> Important policies underlie statutes of limitations: rapid resolution of disputes; repose for those against whom a claim could be brought; avoidance of litigation involving lost evidence or distorted testimony of witnesses. *See Wilson,* 471 U.S. at 271. Sensitive to these policies, *Ricks* and its progeny dictate that the cause of action accrues at the time of the initial injury.

Soignier, supra, at 553; *see also Daill v. Sheet Metal Workers' Local 73 Pension Fund* 100 F.3d 62, 67 (7th Cir. 1996).

Similarly, the Sixth Circuit follows the guidance of *Ricks.* In the Sixth Circuit, the general rule is "statute of limitations ... are triggered at the time the alleged discriminatory act occurred." *E.E.O.C. v. Penton Industrial Pub. Co., Inc.* 851 F.2d 835, 837-838 (6th Cir. 1988). The Sixth Circuit also states that it is important

to note that statutes of limitations "begin to run in response to the discriminatory act (sic) themselves, not in response to the continuing effects of those acts." *Dixon v. Anderson* 928 F.2d 212, 216 (6th Cir. 1991).

Joining with the Sixth and Seventh Circuits, the Eighth Circuit, also citing *Ricks*, has ruled that "[t]he statute of limitations begins to run at the time of the discriminatory act, and not when the consequences of the act become most painful." *Conner v. Reckitt & Colman, Inc.* 84 F.3d 1100, 1102 (8th Cir. 1996).

The Ninth Circuit now is at odds with each of these federal appellate courts.

The ADA does not contain a specific statute of limitations. *Soignier, supra,* at 500. This Court, therefore, has determined that the statute of limitations of the states' personal injury statutes apply. *Id.*, at 551, citing *Goodman v. Lukens Steel Co.* 482 U.S. 656, 661, 96 L.Ed.2d 572, 107 S.Ct. 2617 (1987) and *Wilson v. Garcia, supra.* The statute of limitations in California for personal injury actions is one year. (California Code of Civil Procedure §340(3).)

Discovery of the original act of discrimination triggers the statute of limitations, not the potential and conjectural future confirmation of some injury. *Soignier, supra,* at 551. In other words, the statute of limitations begins to run in an action under Title III of the ADA upon the discovery of the original act of discrimination, not upon some subsequent confirmation or consequence. *Ricks, supra,* at 258; *Conner v. Reckitt & Colman, supra,* at 1102.

> Like punching someone in the nose, this act may lead to injury in the future, but when there is only one wrongful act the claim accrues with the first injury. Put another way, "time starts to run with 'the discriminatory act, not the point at which the consequences of the act become painful.'" *Lever v. Northwestern University* (7th Cir. 1992) 979 F.2d 552, 553, quoting *Chardon v. Fernandez* (1981) 454 U.S. 6, 8, 70 L.Ed.2d 6, 102 S.Ct. 28.

Soignier, supra, at 552. Following this well-established federal precedent, the district court found Doran's claims as to the Paradise and Anderson stores barred by the applicable statute of limitations:

> ... Plaintiff argues that the ongoing nature of the alleged violations somehow eliminates the statute of limitations, and argues that the "futile gesture" language of the ADA means that he did not have to visit the stores and personally experience the barriers within the statutory period.
>
> Plaintiff's argument is unavailing. A federal cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury that is the basis of the action. Alexopoulos v. San Francisco Unified School District, 817 F.2d 551, 555 (9th Cir. 1987); Soignier v. American Board of Plastic Surgery, 92 F.3d 547, 551 (7th cir. 1996), citing Delaware State College v.

> Ricks, 449 U.S. 250 (1980). In his deposition, plaintiff states that he has been inside both the Anderson and Paradise stores before 1997; that is, he must have become aware of whatever barriers exist at the stores more than two years before he brought his claim on March 1, 1999. Accordingly, plaintiff's ADA claims are barred by the one year statute of limitations applicable to ADA claims because plaintiff learned of the violations more than one year before he filed suit.

(App., at 19a-20a.) The district court also analyzed, and rejected, Doran's claim that the continued existence of a barrier constituted a continuing violation that tolled the statute of limitations. After reviewing the cases offered by Doran to support his contention, the district court found them inapposite:

> Plaintiff alleges merely that barriers, which he must have noticed during the visits he made prior to 1997, have remained in place since then. The "continuing violation" doctrine is not applicable, and plaintiff's ADA claims with regard to the Anderson and Paradise stores are therefore barred.

(App., at 22a.) Rejecting the district court's analysis, the Ninth Circuit deemed the violations at Holiday's stores to be of a continuing nature and, as a result, deemed Doran's injury to be continuing. In the words of the Ninth Circuit:

> So long as the discriminatory conditions continue, and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues.
>
> A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period. [Footnote omitted.] But he or she has a cause of action, and is entitled to injunctive relief, for an injury that is occurring within the limitations period, as well as for threatened future injury. Doran states that he is currently aware of barriers to access that now exist at the Paradise store, and that these barriers currently deter him. Indeed, he states that the barriers deterred him from entering the store just before filing suit even though he needed something from the store and was in the parking lot. Doran's suit for injunctive relief is therefore not time-barred.

(App., at 7a-8a.)

In ruling that a single act allegedly in violation of the ADA, occurring more than two years previously, constitutes a continuing injury to the plaintiff, the Ninth Circuit has created an intolerable conflict with the authority of this Court. In *Ricks*, this Court stated that the statute of limitations begins to run at the time of the discriminatory act (i.e., the discovery of the ADA violation), not upon some subsequent confirmation or consequence of that act. *Ricks, supra*, at 258. Further, in

United Air Lines Inc. v. Evans 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), this Court held that the continuing impact of a past violation was not actionable. *Id.* at 558. By ruling that the statute of limitations is tolled so long as the discriminatory act remains, the Ninth Circuit is at odds with the authority of this Court.

According to the authority of this Court, and of that employed by other circuits, Doran's initial discovery of the alleged ADA violations at Holiday's Paradise store is the time when the statute of limitations began to run, not at some later date when the alleged violations continued to exist, Doran re-encountered them, or was allegedly deterred by them.

With the Ninth Circuit's ruling, a different law applies in the states within the Ninth Circuit. Consider a nationwide company employing the same store design throughout the United States, which design contains a barrier potentially in violation of the ADA. In every city except those within the Ninth Circuit, the statute of limitations would bar stale claims. Not so for its stores in Phoenix, Portland, Los Angeles and other cities within the Ninth Circuit. There, in the view of the Ninth Circuit, a statute of limitations no longer exists. An ADA plaintiff encountering a barrier today may bring an action two, three, five or ten years from now. This result simply cannot be reconciled with *Ricks* and its progeny.

CONCLUSION

For the foregoing reasons, Holiday Quality Foods, Inc. respectfully requests that this Court grant certiorari in this case.

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September 12, 2002

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 19, 2002]

Nos. 00-17203 / CV-99-03386-WBS

BRENDA PICKERN; FLOYD SMYTH; PAUL HEARD, *Plaintiffs,*	)
and	)
JERRY DORAN, *Plaintiff-Appellant,*	)
v.	)
HOLIDAY QUALITY FOODS INCORPORATED *Defendant-Appellee.*	)

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Before: David R. Thompson, William A. Fletcher
and Marsha S. Berzon, Circuit Judges
Opinion by Judge William A. Fletcher

COUNSEL

Mark D. Potter and Russell C. Handy, Center for Disability Access, San Diego, California, for the appellant.

Rebecca M. Ceniceros and S. Craig Hunter, Livingston & Mattesich Law corp., Sacramento, California, for the appellee.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiff Jerry Doran appeals the district court's dismissal of his suit seeking injunctive relief for an alleged violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 et seq. ("ADA" or "Title III"). Doran, a paraplegic who uses a wheelchair, alleges that because defendant Holiday Quality Foods' ("Holiday") grocery stores are "public accommodations" within the meaning of the ADA, 42 U.S.C. § 12181(7)(E), Holiday is required to remove architectural barriers that make it difficult for Doran to gain access to one of Holiday's stores. On motion for summary judgment, the district court held that because Doran had not attempted to enter the store during the limitations period, and thus had not actually encountered any barriers during that period, his claim was time-barred and he did not have standing.

We hold that when a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he or she desires access, that plaintiff need not engage in the "futile gesture" of attempting to gain access in order to show actual injury during the limitations period. When such a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief either by the statute of limitations or by lack of standing.

We therefore reverse and remand.

I. Background

Doran has patronized a number of Holiday stores and is a regular customer of the Holiday store in his hometown of Cottonwood, California. He states in a declaration: "My favorite grocery store chain is the Holiday Foods grocery stores. When I need to buy groceries, I look first to Holiday Foods grocery stores." Doran's complaint does not allege ADA violations by the Cottonwood store; rather, he alleges a failure to comply with the ADA at the Holiday in Paradise, California, which is about 70 miles from Cottonwood.[1]

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[1] The complaint also sought injunctive relief against store in Orland, California, and Anderson, California. After oral argument, we ordered a limited remand to the district court for the purpose of determining whether intervening action by the defendant had rendered any of Doran's claims moot. After receiving evidence and hearing testimony, the district court

Doran's grandmother lives in Paradise, and Doran visits Paradise frequently to see her. He states in his deposition that "I try to go every Sunday to see my grandmother. She lives there [in Paradise], so I go up all the time." At some time prior to 1998, Doran visited the Paradise store and encountered the architectural barriers of which he now complains. He states that he would like to patronize the Paradise store when he visits his grandmother, but is deterred from doing so by the store's allegedly unlawful barriers.

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability" in places of public accommodation. 42 U.S.C. § 12182(a). Title III defines "discrimination" as, among other things, a failure to remove "barriers . . . where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). If removal of a barrier is not "readily achievable," a public accommodation must make its facilities available through "alternative methods if such methods are readily available." 42 U.S.C. § 12182(b)(2)(A)(v).

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concluded, without expressing an opinion on the merits of Doran's claims, that his claim as to the Paradise store is not moot. Because the parties stipulated that the Anderson store has closed, the district court found Doran's claims as to that store moot. The district court also determined that, because Doran did not pursue his claim against the Orland store on appeal, that claim is also moot. The claim against the Paradise store is thus the only live claim.

Doran alleges that the Paradise store has inadequate access to and from the parking lot; inadequate checkstand access; inadequate signs; and inadequate access to the restroom and to vending machines. After visiting the store prior to 1998, he visited it again only once before filing his complaint on March 1, 1999. On that second visit, in late 1998, he was obliged, because of the barriers, to wait in the parking lot while his companion went into the store on his behalf. Because Doran delayed for more than a year in filing his complaint after he first became aware of the barriers at the Paradise store, the district court dismissed his complaint. Doran timely appealed from the dismissal.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's grant of summary judgment *de novo*. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We view the evidence in the light most favorable to Doran, the non-moving party. *Id.*

II. Statute of Limitations

The enforcement provisions of Title III provide only for injunctive relief. Damages are not available to individuals. *See* 42 U.S.C. § 12188(a) (providing that the remedies available to individuals shall be those set forth in 42 U.S.C. § 2000a-3(a), which allows only injunctive relief for violations of Title II of the Civil Rights Act of 1964, Pub. L. 88-352, *codified as amended at* 42 U.S.C. § 2000a et seq.); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (Title II allows

injunctive relief only). Injunctive relief is available to "any person who *is being subjected to* discrimination on the basis of disability" or who has "reasonable grounds for believing that such person *is about to be subjected to* discrimination. 42 U.S.C. § 12188(a)(1) (emphases added). By employing the phrases "is being subjected to" and "is about to be subjected to," the statute makes clear that either a continuing or a threatened violation of the ADA is an injury within the meaning of the Act. A plaintiff is therefore entitled to injunctive relief to stop or to prevent such injury.

Seeking to avoid unreasonable burdens on ADA plaintiffs, Title III explicitly provides that it does not require "a person with a disability to engage in a *futile gesture* if such person has actual notice that a person or organization . . . does not intend to comply" with the ADA. *Id.* (emphasis added). The "future gesture" language of Title III is taken from *Teamsters v. United States*, 431 U.S. 324, 366 (1977). In *Teamsters*, the Court held that plaintiffs who did not actually apply for promotions could nevertheless challenge the employer's racially discriminatory seniority system under Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, *codified as amended at* 42 U.S.C. § 2000e et seq., if they could show that they would have applied for the job if not for the employer's discriminatory practices. *See Teamsters*, 431 U.S. at 367-68. The Court reasoned that "[w]hen a person's desire for a job is not translated into a formal application *solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination* as is he who goes through the

motions of submitting an application." *Id.* at 365-66 (emphasis added).

Congress specifically intended that *Teamsters'* "futile gesture" reasoning be applied to ADA claims. *See* H. Rep. No. 101-485(II) at 82-83 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303, 365 ("The Committee intends for this doctrine to apply to this title"); S. Rep. No. 101-116 at 43 (1989). Thus, under the ADA, once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury. *See also Davoll v. Webb*, 194 F.3d 1116, 1132-33 (10th Cir. 1999) (disabled employee not required to initiate interactive process leading to reasonable accommodation where employer has made clear it will not engage in the interactive process). So long as the discriminatory conditions continue, and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues.

A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period.[2] But he or she has a cause of action, and is

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[2] The parties agree that a one-year limitations period applies. Because the ADA does not contain a statute of limitations, the court must apply the statute of limitations of the most analogous state law. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660; *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1140 (9th Cir. 2000). Most district courts have applied California's one-year limit for personal injury actions to federal disability discrimination claims brought in

entitled to injunctive relief, for an injury that is occurring within the limitations period, as well as for threatened future injury. Doran states that he is currently aware of barriers to access that now exist at the Paradise store, and that these barriers currently deter him. Indeed, he states that the barriers deterred him from entering the store just before filing suit even though he needed something from the store and was in the parking lot. Doran's suit for injunctive relief is therefore not time-barred.

III. Standing

If Doran's statements are true, he has suffered and is suffering an injury within the meaning of Title III of the ADA. However, his injury must also satisfy the "case" or "controversy" requirement of Article III of the Constitution. As the Supreme Court has recently construed that requirement, a plaintiff must show three things:

> First [he must have] suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or

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California. *See Daviton v. Columbia/HCA Healthcare Corp.* 241 F.3d 1131, 1136 n.8 (9th Cir. 2001) (citing cases, but not deciding the issue of whether a one-year limitations period applied to a disability claim brought under § 1983). Because the parties agree that the applicable limitations period is one year and do not argue the point to us, we assume without deciding that they are correct.

> imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quotations and citations omitted). The second and third elements are not at issue; Holiday's noncompliance with Title III has caused Doran's injury, and an injunction requiring Holiday to comply with the ADA would redress it. The only question is whether Doran is suffering a sufficiently "concrete and particularized" and "actual or imminent" injury to satisfy the Court's "injury in fact" requirement.

"By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. In the context of the ADA, we understand that to mean that Doran must himself suffer an injury as a result of the Paradise store's noncompliance with the ADA. We hold that in stating that he is currently deterred from attempting to gain access to the Paradise store, Doran has stated sufficient facts to show concrete, particularized harm.

In so holding, we agree with *Steger v. Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000), in which the Eighth Circuit held that a blind plaintiff who had only once attempted to enter the defendant's building had standing to bring

an ADA challenge. The plaintiff was thwarted in his attempt to gain access to the men's restroom in the building because the signage did not comply with the ADA. *Id.* at 893-94. Like that plaintiff, Doran has personally encountered certain barriers that bar his access to Holiday's Paradise store. Further, the *Steger* court rejected the defendant's argument that the blind plaintiff could challenge the ADA violation only as to the restroom he had attempted to access, stating that such a "narrow construction" of the ADA would be "not only . . . inefficient, but impractical." *Id. See also Parr v. L&L Drive-Inn Restaurant,* 96 F. Supp. 2d 1065, 1080-81 (D. Haw. 2000) ("This court is reluctant to embrace a rule of standing that would allow an alleged wrongdoer to evade the court's jurisdiction so long as he does not injure the same person twice . . . . Plaintiff should not be required to encounter every barrier seriatim . . . to obtain effective relief." (internal quotations and citation omitted)). We agree with the Eighth Circuit that Doran need not necessarily have personally encountered all the barriers that bar his access to the Paradise store in order to seek an injunction to remove those barriers.

In addition to suffering a concrete injury particular to himself, Doran must also have suffered actual or imminent harm. We hold that a disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA has suffered "actual harm." Similarly, a plaintiff who is threatened with harm in the future

because of existing or imminently threatened non-compliance with the ADA suffers "imminent harm."

Doran has visited Holiday's Paradise store in the past and states that he has actual knowledge of the barriers to access at that store. Doran also states that he prefers to shop at Holiday markets and that he would shop at the Paradise market if it were accessible. This is sufficient to establish actual or imminent harm for purposes of standing. *Compare Dudley v. Hannaford Bros. Co.*, 146 F. Supp. 2d 82, 86 (D. Me. 2001) (disabled plaintiff alleged actual injury where he evinced a desire to patronize a store that had discriminated against him in the past and had not changed its discriminatory policies or practices; the plaintiff "[did] not claim he wants to visit the other stations, or will ever do so."). *See also Parr*, 96 F. Supp. 2d at 1978-80 (disabled plaintiff established likelihood of future injury by submitting evidence that he would like to visit defendant's restaurant in the future, had patronized other restaurants in the chain, and the restaurant was close to his residence and was on a familiar bus line); *Dudley*, 146 F. Supp. 2d at 86 (plaintiff's attempt to purchase liquor had occurred outside the limitations period, but "a single past incident of discrimination can provide . . . grounds for a plaintiff's standing, as long as the lack of accommodation continues to exist" (citing *Parr*, 96 F. Supp. 2d at 1077-83)).

IV. Conclusion

Viewing the evidence in the light most favorable to Doran, we hold that his suit for injunctive relief is not time-barred and that he has standing under the ADA and under Article III.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Filed October 18, 2000]
No. CIV S-99-386 WBS DAD

JERRY DORAN, *Plaintiff,*	)
v.	)
HOLIDAY QUALITY FOODS, INC., A California Corporation, *Defendant.*	)

JUDGMENT IN A CIVIL CASE

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF OCTOBER 18, 2000.

ENTERED:
October 18, 2000

Jack L. Wagner,
Clerk of the Court
by: /s/
P. Buzio, Deputy Clerk

MEMORANDUM AND ORDER

This action involves claims under Title III of the Americans with Disabilities Act ("ADA"), 45 U.S.C. § 12101 et seq.; the Unruh Civl (sic) Rights Act ("Unruh Act"), Cal. Civ. Code § 51 et seq.; and the Unfair business Practices Act ("CUBPA"), Cal. Bus. & Prof. Code § 17200, based on lack of wheelchair accessibility at three of defendant's supermarkets. Defendant moves for summary judgment pursuant to Federal Rule of Civil Procedure 56.

I. Factual Background

Defendant owns and operates a chain of supermarkets ("Holiday Markets") in various locations, including the California cities of Anderson, Orland, and Paradise. (Am. Compl. ¶ 6).

Plaintiff, who is a paraplegic, regularly shops for groceries at defendant's market near his home in Cottonwood, CA.[3] Plaintiff has never visited the Orland store. Since 1997, plaintiff has visited the Anderson store one time. (Opp'n at 3). Plaintiff has visited the Paradise store one time. On that occasion, he waited for his companion in the parking lot and did not attempt to enter the store (Doran Dep. at 36:15-16). According to plaintiff, he would regularly shop at the Anderson and Paradise stores if they were

[3] The Cottonwood store is not at issue in this case.

handicapped-accessible because he frequently visits family and friends in those locations.

Plaintiff alleges that various "architectural barriers" exist at the three stores, preventing his access to parking, paths of travel, restrooms, and checkout facilities. (Compl. ¶ 8). Plaintiff seeks injunctive relief compelling defendant to bring the three stores into compliance with the ADA. 42 U.S.C. § 12101 et seq. Plaintiff's complaint contains four claims against all three stores: (1) injunctive relief under the ADA; (2) injunctive relief and damages under the Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq; (3) injunctive relief and damages under California's Disabled Persons Act, § 54 et seq., (4) injunctive relief under the California Unfair Business Practices Act, Cal Bus & Prof. § 172100 et seq.

Defendant moves for summary judgment on plaintiff's ADA claims on the basis that plaintiff lacks standing to seek injunctive relief because (1) plaintiff faces no imminent injury, and (2) plaintiff failed to bring the action within the applicable statute of limitations. Defendant also moves for summary judgment on plaintiff's state law claims for the same reasons, and on the basis that plaintiff has suffered no injury.

II. Applicable Law

A. Standard for Summary Judgment

The court grants summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The non-moving (sic) may not simply deny the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett 317, 324 (1986). "[A] summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must shore more than a mere "metaphysical doubt" as to material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

B. Standing

Standing refers to "whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." Allen v. Wright, 468 U.S. 737, 752 (1984). When standing is challenged, the party claiming federal jurisdiction has the burden to clearly "allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the

court's remedial powers." Warth v. Seldin, 422 U.S. 490, 518 (1975); see also Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Plaintiff must meet three constitutional requirements to establish standing: (1) plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. See id. at 560-561. When, as here, a plaintiff seeks injunctive relief, he must also demonstrate that he faces a "real and immediate threat" of future harm. It is not enough to plead past exposure to illegal conduct. See DeLil v. El Torito Restaurants, 1997 WL 714866 (N.D. Cal. 1997) (quoting Los Angeles v. Lyons, 461 U.S. 95 (1983), ("[Plaintiff] cannot obtain standing to sue for injunctive relief merely by alleging that [defendant] has a policy and practice of discriminating against disabled persons generally; she must demonstrate that she herself faces a 'real and immediate threat' of future harm.").

A vague statement of intention to visit a place where one's rights may be infringed, without a concrete plan or showing of likelihood, does not suffice to show imminence of injury. See Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). However, where the contemplated activity is not one which lends itself to advance planning, courts have examined the totality of circumstances to determine the likelihood of the injury occurring. See Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065 (E.D. Haw. 2000).

C. The ADA

The ADA authorizes injunctive relief ordering owners and operators of public accommodations to make their facilities readily accessible to disabled individuals. See 43 U.S.C. § 12188 (a) (2). Section 12188 also states in pertinent part: "Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that [a facility owner] does not intend to comply with its provisions." 42 U.S.C. § 12188 (a) (1).

The ADA does not contain its own statute of limitations. Where federal statutes do not contain their own limitations periods, federal courts apply the statute of limitations of the most analogous state laws. See Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987). Many courts have analogized ADA cases to state personal injury actions. See Holmes v. Texas A & M Univ., 145 F.3d 681, 683-84 (5th Cir. 1998); Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 551 (7th Cir. 1996) cert. denied, 519 U.S. 1093, 117 S.Ct. 771, 136 L.Ed.2d 716 (1997). Many California district cases have applied a one year statue of limitations to ADA actions. See Alberti v. City, County of San Francisco Sheriff's Dept., 32 F. Supp. 2d 1164, 1172 (N.D. Cal. 1998); (Larramendy v. San Mateo county Transit Dist., 1998 WL 456283 (N.D. Cal. 1998); Avery v. Tri-County Extradition, Inc., 1999 WL 183604 (N.D. Cal. 1999); Schneider v. City and County of San Francisco, 999 WL 144878 (N.D. Cal. 1999); McColm v. Santa Clara

County, 1997 WL 33016 (N.D. Cal. 1997); Schonfeld v. City of Carlsbad, 978 F.Supp. 1329, 1332-33 (S.D. Cal. 1997). On the other hand, at least one Northern District case has held that a three year statute of limitations should apply, based on Ninth Circuit dicta regarding the Unruh Act. See Kramer v. Regents of the University of California, 81 F. Supp. 2d 972 (N.D. Cal 1999). The parties in this case agree that a one year statute of limitations applies, and this court follows the majority of the decided cases. See Cal. Civ. Code of Civil Procedure §340(3).

III. Discussion

A. Statute of Limitations: Paradise and Anderson Stores

Defendant argues that plaintiff's injuries fall outside the one-year statute of limitations for personal injury actions, and that plaintiff is therefore barred from seeking relief. Plaintiff argues that the ongoing nature of the alleged violations somehow eliminates the statute of limitations, and argues that the "futile gesture" language of the ADA means that he did not have to visit the stores and personally experience the barriers within the statutory period. (Opp'n at 5-6.)

Plaintiff's argument is unavailing. A federal cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury that is the basis of the action. Alexopoulos v. San Francisco Unified School District, 817 F.2d 551, 555

(9th Cir. 1987); Soignier v. American Board of Plastic Surgery, 92 F.3d 547, 551 (7th cir. 1996), citing Delaware State College v. Ricks, 449 U.S. 250 (1980). In his deposition, plaintiff states that he has been inside both the Anderson and Paradise stores before 1997; that is, he must have become aware of whatever barriers exist at the stores more than two years before he brought his claim on March 1, 1999. Accordingly, plaintiff's ADA claims are barred by the one year statute of limitations applicable to ADA claims because plaintiff learned of the violations more than one year before he filed suit.

Plaintiff suggests that the statute of limitations has been tolled because the barriers, i.e., the alleged harm, have continued to exist until the present time. While plaintiff has provided no authority for this proposition, the court has found some cases which address the point: Schonfeld v. City of Carlsbad, 978 F. Supp. 1329 (S.D. Cal. 1997); and Deck v. City of Toledo, 56 F. Supp. 2d 886 (N.D. Ohio 1998).

The District Court in Schonfeld stated, in dicta, that an ADA suit to cure ongoing "subjection to discrimination" would not be barred by the applicable statute of limitations. The sold support cited is Indep. Housing Services v. Fillmore ctr., 840 F. Supp. 1328, 1346 (N.D. Cal. 1993(. The relevant discussion in Indep. Housing is also dictum, but it does cite the applicable authority of Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1480 (9th Cir. 1989):

> "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions. Williams v. Owens-Illinois, Inc. 665 F.2d 918, 924 (9th Cir.) (citation omitted), cert. denied, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982)"

The plaintiff in Green was not attempting to bring stale claims. Rather, she was alleging that events occurring outside the statutory period were so related to subsequent events, occurring within the statutory period, as to be actionable. The discussion above is dictum, because the court ruled that the "continuing violation" doctrine did not apply. Moreover, the language does not address conditions such as those at issue in this case, but refers to policies which manifest themselves in separate, sequentially occurring incidents.

Deck vs. City of Toledo, 56 F. Supp. 2d 886 (N.D. Ohio 1998), inquired whether a city's ongoing failure to install ADA-compliant ramps constituted a continual

violation that would toll the statute of limitations.[4] The court ruled that as long as at least one noncompliant ramp had been installed within the statutory period, the previous failures would be deemed part of a pattern continuing into the statutory period and thus representing a continuing violation.

Plaintiff's case is not analogous to either of these situations. With regard to Green and its progeny, plaintiff has not alleged that sequential events occurred which indicate an ongoing policy. With regard to Deck, plaintiff has not alleged that any new action, such as the construction of a barrier, has occurred within the statutory period. Plaintiff alleges merely that barriers, which he must have noticed during the visits he made prior to 1997, have remained in place since then. The "continuing violation" doctrine is not applicable, and plaintiff's ADA claims with regard to the Anderson and Paradise stores are therefore barred.

B. Standing: Orland Store

Plaintiff has not established a likelihood of future harm with respect to the Orland store, because he has not alleged any likelihood that he would shop for groceries in Orland. He has not alleged that Orland is near his home or that he has friends or family whom he

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[4] Plaintiffs had previously requested, and received, an injunction mandating the modification of existing ramps: there was no statute of limitations argument raised in that proceeding. Deck v. city of Toledo, 29 F. Supp. 2d 431, 433 (N.D. Ohio 1998).

is likely to visit in Orland. The fact that he has never been to the Orland store strongly suggests that he has no reason to go there.

Plaintiff relies on the language of 42 U.S.C. § 12188 for the proposition that his alleged desire to visit the Orland store is sufficient to establish standing. However, the "futile gesture" language on which plaintiff relies cannot abrogate the constitutional requirements of standing, including the requirement of a "real and immediate threat" for a claim for injunctive relief. See, e.g., DeLil v. El Torito Restaurants, 1997 WL 714866, *4 (N.D. Cal. 1997). ("Although a plaintiff need not repeatedly suffer discrimination in order to assert her rights . . . ADA plaintiffs who seek injunctive relief must still demonstrate that they themselves face a real and immediate threat of future harm."); Hoepfl v. Barlow, 916 F. Supp 316, 323 (E.D. Va. 1995) ("A plaintiff who cannot demonstrate a likelihood that she will ever again suffer discrimination at the hands of a defendant, even one who has discriminated against her in the past, does not have standing to obtain an injunction under the ADA."); Schroedel v. New York University Medical Center, 885 F. Supp. 594, 598-99 (S.D.N.Y. 1995((denying standing to seek injunction under ADA against local hospital because the potential injury was speculative rather than imminent). Here, plaintiff has not alleged any facts showing that his expectation of injury at the Orland store is concrete or imminent. Plaintiff's claim regarding the Orland store therefore fails for lack of standing.

C. California State Law Claims

Under 28 U.S.C. § 1367(c) (3), the court has discretion to dismiss state law claims when it has dismissed all of plaintiff's federal claims. "In the usual case in which federal law claims are eliminated before trial, the balance of factors will point toward declining to exercise jurisdiction over the remaining state law claims." Reynolds v. County of San Diego, 84 F.3d 1162, 1171 (9th Cir 1997). Some circuits have held that a court may retain jurisdiction over state law claims if extraordinary or unusual circumstances justify their retention. See, e.g., Wentzka v. Gellamn, 991 F.2d 423, 425 (7th cir. 1993); Musson Theatrical, Inc. v. Federal Express corp., 89 F.3d 1244, 1255 (6th Cir. 1996). However, here there has been no showing of extraordinary or unusual circumstances. Accordingly, the court declines to exercise supplemental jurisdiction under 28 U.S.C. § 1367 as to the remaining state law claims.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment as o the each of the claims be, and the same hereby is, GRANTED.

DATED: October 17, 2000

/s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

Supreme Court U.S.
FILED
OCT 18 2002
OFFICE OF THE CLERK

No. 02-449

IN THE

Supreme Court of the United States

HOLIDAY QUALITY FOODS, INC.,

Petitioner,

v.

JERRY DORAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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I. SUMMARY OF ARGUMENT

This Court should deny the petition for writ of certiorari. The Petitioner's "questions presented for review" rely upon a faulty understanding of the Ninth Circuit's holding. The Petitioner characterizes the Ninth Circuit as holding that standing could exist "*even in the absence of concrete and particularized injury in fact.*" But the Ninth Circuit did not issue this holding. The Ninth Circuit held that a plaintiff must show concrete and particularized injury: "*In the context of the ADA, we understand that to mean that Doran must himself suffer an injury as a result of the Paradise store's noncompliance with the ADA.*"

The Petitioner then characterized the Ninth Circuit as holding that "*a plaintiff's claims under the ADA are not barred by the statute of limitations even though the claim is based on acts known to have occurred far outside the limitations period.*" But the Ninth Circuit did not issue this holding. The Ninth Circuit actually held that:

> *A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period. [Footnote omitted.] But he or she has a cause of action, and is entitled to injunctive relief, for an injury that is occurring within the limitations period, as well as for threatened future injury.*

In other words, the Petitioner has not raised a ripe issue for review. The Petitioner has made the mistake known as the "straw-man" fallacy by attributing a false position to the Ninth Circuit and then urging this Court to review such position.

II. LEGAL ARGUMENT: THIS COURT SHOULD DENY THE WRIT OF CERTIORARI

This Court should deny certiorari because the petitioner has failed to present a question that is properly subject to judicial review. It is fundamental constitutional law that the parties, no matter how eager, cannot compel a court to decide a hypothetical question when no case or controversy exists. The principle applies to both problems of ripeness and mootness. *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974) (questions not ripe for review fail to present the Court with a case or controversy); *Kremens v. Bartley*, 431 U.S. 119, 52 L. Ed. 2d 184, 97 S. Ct. 1709 (1977) (moot questions fail to present the Court with a case or controversy).

Because the Ninth Circuit has not issued the ruling Petitioner claims has been issued, Petitioner's questions presented are hypothetical and therefore not ripe for review. The Petitioner has engaged in the illegitimate rhetorical device known as the straw-man fallacy because it attributes false holdings to the Ninth Circuit and then attacks those holdings. Respondent addresses each of Petitioner's questions presented in turn.

A. PETITIONER'S FIRST QUESTION PRESENTED MISSTATES THE NINTH CIRCUIT'S HOLDING IN THE CASE BELOW AND THUS THERE IS NO GENUINE QUESTION FOR THIS COURT TO DECIDE.

Petitioner' first "question for review" demonstrates a fundamental misunderstanding of the Ninth Circuit's ruling in the case below. Specifically, in its first "question for

review," Petitioner states that the Ninth Circuit held that standing could exist "*even in the absence of concrete and particularized injury in fact.*" (Petition, p. "i"). This holding **would be** a remarkable departure from long standing precedence and **would be** a proper holding for review by this Court. *See Lujan v. Defenders if Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (doctrine of standing is a hallmark of cases or controversies which may be resolved through judicial process).

But the Ninth Circuit did ***not*** issue that ruling. In fact, the Ninth Circuit cited *Lujan* as binding authority, agreed with *Lujan's* holding, and affirmed its belief that a plaintiff must show concrete and particularized injury in order to maintain a viable case. The Ninth Circuit's ruling reads in pertinent part:

> In the context of the ADA, we understand that to mean that Doran must himself suffer an injury as a result of the Paradise store's noncompliance with the ADA. We hold that in stating that he is currently deterred from attempting to gain access to the Paradise store, Doran has stated sufficient facts to show concrete, particularized injury.

Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1137-38 (2002).

Thus, contrary to Petitioner's assertion, the Ninth Circuit did ***not*** hold that a plaintiff who has ***not*** suffered concrete and particularized injury nonetheless has standing to bring suit. The Petitioner mischaracterized the Ninth Circuit's holding and the Petitioner's argument should be rejected.

In another improper treatment of the Ninth Circuit's holding, the Petitioner sets up his straw-man argument by quoting the Ninth Circuit out of context. The Petitioner cites the Ninth Circuit thusly:

> *When . . . a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief . . . by lack of standing.*

(App. at 3a) (Petition, p.7). This "quote" attempts to attribute a holding to the Ninth Circuit that it did not make. First, the actual quote, in its entirety, is as follows:

> We hold that when a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he or she desires access, that plaintiff need not engage in the "futile gesture" of attempting to gain access in order to show actual injury during the limitations period. When such a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief either by the statute of limitations or by lack of standing.

Pickern, 293 F.3d at 1135. The Ninth Circuit further clarified its holding in the body of its opinion by stating:

> In addition to suffering a concrete injury particular to himself, Doran must also have suffered actual or imminent injury. We hold that a disabled individual who is **currently deterred** from patronizing a public accommodation due to a defendant's failure to comply with the ADA has

> suffered "actual injury." Similarly, a plaintiff who is threatened with harm in the future **because of existing** or imminently threatened non-compliance with the ADA suffers "imminent injury."
>
> Doran has visited Holiday's Paradise store in the past and states that **he has actual knowledge of the barriers** to access at that store. Doran also states that he prefers to shop at Holiday markets and that **he would shop at the Paradise market if it were accessible**. This is sufficient to establish actual or imminent injury for purposes of standing.

Pickern, 293 F.3d at 1138 (emphasis added).

Thus, the Ninth Circuit did not hold that a plaintiff "need not show standing" in order to maintain a lawsuit under the ADA. To the contrary, the Ninth Circuit merely held that a plaintiff who (1) has actual knowledge of the barriers to access, (2) wants to patronize the store, and (3) is deterred because of those barriers, **has established** injury and standing.

The Ninth Circuit broadly held that plaintiffs seeking injunctive relief from ongoing violations of the ADA have standing because such plaintiffs have suffered both actual and imminent harm:

> We hold that a disabled individual who is currently deterred from patronizing a public accommodation due to defendant's failure to comply with the ADA has suffered "***actual harm***."

> Similarly, a plaintiff who is threatened with harm in the future because of an existing or imminently threatened non-compliance with the ADA suffers "***imminent harm***."

Id. (emphasis added).The Ninth Circuit also narrowly held that Respondent is specifically such a plaintiff who suffers actual and imminent harm through Petitioner's putatively illegal conduct:

> We hold that in stating that he [Respondent] is currently deterred from attempting to gain access to the Paradise store, [Respondent] Doran has stated sufficient facts to show concrete particularized harm.

Id. Because the Ninth Circuit held that Respondent has suffered an injury in fact, which is personal, distinct and palpable, the exercise of federal jurisdiction in this matter was consistent with Article III's limitation. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 – 100, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979) (Article III's standing requirement is satisfied upon a plaintiff's showing that he has suffered actual or imminent harm at defendant's hand); *accord Lujan, supra*, at 560; *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000). Thus, contrary to Petitioner's assertion, the Ninth Circuit's ruling in the case below is consistent with the long-standing principle that a plaintiff must have standing in order to present the court with a viable case or controversy for resolution.

Petitioner's first question presented — whether the Ninth Circuit erred in holding that a plaintiff has standing to sue

under the ADA even in the absence of an injury in fact — is not properly before this Court as the Ninth Circuit has made no such ruling. The Ninth Circuit has ***not*** ruled that a lack of standing, stemming from an absence of injury in fact, is no barrier to federal jurisdiction and thus the question of whether such a ruling would be an error is not ripe for review.

Petitioner failed to present an issue that is ripe for review because Petitioner's "concern" is based on a misunderstanding of the Ninth Circuit's ruling. Petitioner has failed to frame its first question presented such that this Court could properly review the issue.

B. PETITIONERS SECOND QUESTION PRESENTED MISSTATES THE NINTH CIRCUIT'S HOLDING IN THE CASE BELOW AND THUS THE ISSUE IS NOT RIPE FOR REVIEW.

Petitioner's second question presented further demonstrates Petitioner's fundamental misunderstanding of the Ninth Circuit's ruling in the case below and likewise fails to properly frame a question that might be resolved by a Writ of Certiorari. Specifically, in framing its second "question for review," the Petitioner characterizes the Ninth Circuit's holding as "a plaintiff's claims under the ADA are not barred by the statute of limitations even though the claim is based on acts known to have occurred far outside the limitations period." (Petition, p. "i"). **If this were** the holding of the Ninth Circuit, it might be considered a wholesale abandonment of the statute of limitations period.

This was not the holding of the Ninth Circuit. Here again, the Ninth Circuit did ***not*** issue a ruling that flies in the face of such a fundamental premise of American jurisprudence.

See Wilson v. Garcia, 471 U.S. 261, 266-67, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985) (illustrating the Court's long-standing recognition of important policies underlying statutes of limitations). The Ninth Circuit's ruling reads in pertinent part:

> A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period. [Footnote omitted.] But he or she has a cause of action, and is entitled to injunctive relief, for an injury that is occurring within the limitations period, as well as for threatened future injury.

Pickern, 293 F.3d at 1137.

Thus, contrary to Petitioner's suggestion, the Ninth Circuit did ***not*** hold that a plaintiff who files a complaint after the statute of limitations expires nonetheless has a viable case or controversy. Quite the opposite, the Ninth Circuit plainly stated, "A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period." *Id.* The Ninth Circuit held that Respondent's claim was brought during the limitations period and stated: "[s]o long as the discriminatory conditions continue, and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues."

The injury occurs at the time of deterrence. The defendant's discriminatory actions are ongoing as they continue to open their doors and invite the public but fail to remove segregating, discriminatory barriers to persons with disabilities. *See* 42 U.S.C. § 12182(b)(2)(A)(iv) (defining discrimination as the failure to remove architectural barriers).

Thus, Petitioner's second question presented — whether the Ninth Circuit erred in holding that a plaintiff is not barred by the statute of limitations even though the claim is based on acts known to have occurred far outside the limitations period — is not properly before this Court as the Ninth Circuit has made no such ruling. The Ninth Circuit has ***not*** ruled that claims brought after the limitations period expires are nonetheless valid and thus the question of whether such a ruling would be an error is not ripe for review.

Even assuming Petitioner's assertion that the Ninth Circuit had ruled that an expired limitations period is no bar to judicial review in this case — ***which the Ninth Circuit has not*** — the Ninth Circuit expressly stated that Respondent suffers from a continuing injury at the hands of Petitioner that prevented the foreclosure of the limitation period. In so doing, the Ninth Circuit correctly held that Respondent's claim is timely. Thus, even assuming the Ninth Circuit had ruled that foreclosure of the limitations period does not bar a valid claim under the ADA, the Ninth Circuit nevertheless found the limitations period in this case was still running and thus the question of whether the limitation period's expiration foreclosed Respondent's ability to file a valid claim in this case would be a moot question.

As such, not only has Petitioner failed to present an issue that is ripe for review, but, even when viewed in a light most favorable to Petitioner, Petitioner's second question presented is at best moot. Accordingly, Petitioner has failed to frame its second question presented such that this Court could properly review the issue.

III. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny certiorari in this case.

Respectfully submitted,

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